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The "Bipartisan Trade Deal," Trade Promotion Authority and the Future of U.S. Free Trade Agreements

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THE "BIPARTISAN TRADE DEAL," TRADE PROMOTION AUTHORITY AND THE FUTURE OF U.S. FREE TRADE AGREEMENTS

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I. INTRODUCTION[1]

For most of the post-World War II period, the United States has exercised leadership in global efforts to achieve freer trade via reductions in tariff and non-tariff barriers as well as other available means. Prior to 1985, these efforts focused almost exclusively on the General Agreement on Tariffs and Trade ("GATT")[2] after the failure by the United States to approve the Havana Charter for an International Trade Organization[3] and on various subsequent negotiating rounds under GATT. The Truman Administration put the GATT into force through a "Protocol of Provisional Application" based on the assertion by the United States that existing national legislation authorized accepting the GATT commitments.[4] While congressional majorities eventually supported GATT and the WTO in 1994, the free trade policies of the United States have, from time to time, lacked broad support in Congress

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1. This article is adapted from parts of several chapters in DAVID A. GANTZ, REGIONAL TRADE AGREEMENTS: LAW, POLICY & PRACTICE (Carolina Academic Press, 2009) [hereinafter GANTZ].

2. *See generally* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT], *available at* http://sul-derivatives.stanford.edu/derivative?CSNID=92290274&mediaType=application/pdf.

3. Apparently, the United States failed to approve the Havana Charter because of concerns that the Havana Charter and the International Trade Organization that it would have created, "would excessively constrain national sovereignty." MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 23 (3d ed. 2005).

4. JOHN H. JACKSON, WORLD TRADE AND THE LAW OF THE GATT 60–63 (1969); Protocol of Provisional Application of the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A2051, 55 U.N.T.S. 308, *reprinted in* JACKSON, *supra*, at 882–83.

and with the American public. Never in the post-war period has such support seemed as lacking as at the present time.

The year 1985 marked a pivotal period in U.S. foreign trade policy. The United States began to depart from its long-standing opposition to regional trade agreements ("RTAs").[5] Specifically, it adopted a policy that both recognized the importance of RTAs and continued to value the role of the GATT (now the WTO) in Geneva. Between 1985 and 2007, the United States concluded free trade agreements ("FTAs")[6] with Israel,[7] Canada,[8] Mexico (through NAFTA),[9] Jordan,[10] Singapore,[11] Chile,[12] the DR-CAFTA nations (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua),[13] Australia,[14] Morocco,[15] Bahrain,[16] Oman,[17] Peru,[18] Colombia,[19]

5. The term "regional trade agreement" is used in this article (and at the WTO) to designate trade agreements other than those negotiated globally in Geneva under the auspices of the World Trade Organization, whether the RTA is truly regional, like NAFTA or MERCOSUR, or spans several continents, such as the United States-Australia Free Trade Agreement.

6. A free trade agreement, as defined in GATT, is a regional agreement under the terms of which "duties and other restrictive regulations of commerce" on "substantially all trade" are eliminated "within a reasonable length of time," usually ten years. GATT, *supra* note 2, art. XXIV.

7. United States-Israel: Free Trade Area Agreement, U.S.-Isr., Apr. 22, 1985, 24 I.L.M. 653, *available at* http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005439.asp.

8. United States-Canada: Free Trade Agreement, U.S.-Can., Dec. 22, 1987–Jan. 2, 1988, 27 I.L.M. 281 [hereinafter CFTA] (suspended when NAFTA entered into force).

9. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993), *available at* http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtpiID=ALL [hereinafter NAFTA] (includes full text and annexes).

10. Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, U.S.-Jordan, Oct. 24, 2000, 41 I.L.M. 63 (2002), [hereinafter U.S.-Jordan FTA] *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_ upload_file250_5112.pdf.

11. United States-Singapore Free Trade Agreement, U.S-Sing., May 6, 2003, 42 I.L.M. 1026 (2003) [hereinafter Singapore FTA], *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf.

12. United States-Chile Free Trade Agreement, U.S.-Chile, June 6, 2003, 42 I.L.M. 1026 (2003) [hereinafter Chile FTA], *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file535_3989.pdf.

13. The United States-Central America-Dominican Republic Free Trade Agreement, U.S.-CAFTA-DR, Aug. 5, 2004, http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html [hereinafter DR-CAFTA].

14. United States-Australia Free Trade Agreement, U.S.-Austl., May 18, 2004, 43 I.L.M. 1248 (2004) [hereinafter AFTA], *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html.

15. United States-Morocco Free Trade Agreement, U.S.-Morocco, June 15, 2004, 44 I.L.M. 544 (2005) [hereinafter U.S.-Morocco FTA], *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/FInal_Text/Section_Index.htm.

Panama[20] and South Korea.[21] All of these FTAs—except those with Panama, Colombia and South Korea—have received foreign and congressional approval and are in force. During the same period, the United States also played a leading role in the Uruguay Round of GATT negotiations (1986–1994) and has participated in the Doha Development Round of WTO negotiations (1991–present).[22]

This article raises the question whether the United States will continue its active support of current and future global and regional international trade liberalization. The discussion consists of five additional parts. Part II focuses primarily on the recent political context surrounding U.S. Executive Branch efforts to negotiate new trade agreements, particularly FTAs. Part III discusses the evolution of special legislation known as Trade Promotion Authority ("TPA"), formerly known as "fast-track,"[23] in which the President was authorized to negotiate and conclude global and regional trade agreements. TPA itself reflects the political complexities of negotiating international agreements, including free trade agreements, in a system with a constitutional separation of powers structure. TPA has evolved into an increasingly detailed set of negotiating objectives and procedures through which Congress has sought to oversee and participate in the trade-negotiating process.

16. United States-Bahrain Free Trade Agreement, U.S.-Bahr., Sep. 14, 2004, 44 I.L.M. 544 (2005), *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Bahrain_FTA/final_texts/Section_Index.html.

17. United States-Oman Free Trade Agreement, U.S.-Oman, Jan. 19, 2006, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Oman_FTA/Final_Text/Section_Index.html.

18. United States-Peru Trade Promotion Agreement, U.S.-Peru, Apr. 12, 2006, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/Section_Index.html [hereinafter Peru TPA].

19. United States-Colombia Trade Promotion Agreement, U.S.-Colom., Nov. 22, 2006, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Colombia_FTA/Final_Text/Section_Index.html [hereinafter Colombia FTA] (not in force as of Jan. 2009).

20. United States-Panama Trade Promotion Agreement, U.S.-Pan., June 28, 2007, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Panama_FTA/Final_Text/Section_Index.html [hereinafter Panama TPA] (not in force as of Jan. 2009).

21. Free Trade Agreement between the United States and the Republic of Korea, U.S.-S.Korea, June 30, 2007, *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Final_Text/Section_Index.html [hereinafter KORUS] (not in force as of Jan. 2009).

22. The United States has continued its active participation in the Doha Round of negotiations at the WTO even after the Trade Promotion Authority expired July 1, 2007. As of early 2009, the Doha discussions are stalled.

23. 19 U.S.C. §§ 3801–3813 (2002) (expired 2007).

Part IV considers the May 2007 Bipartisan Trade Deal ("BTD").[24] The BTD was effectively a refinement, without formal legislative action, of TPA. Whether the BTD becomes as ephemeral as TPA remains to be seen. Part V discusses the major stumbling blocks to achieving congressional action on the FTAs with Panama, Colombia and South Korea. Part VI draws conclusions for the future of FTA and other trade negotiations by the United States.

II. THE POLITICS OF TRADE NEGOTIATIONS IN THE UNITED STATES

A. Factors Threatening Continued U.S. Leadership in Freer Trade

The ability of the United States government to conclude international trade agreements has weakened since 1995. The United States remains one of the most open markets in the world with a trade-weighted average applied tariff rate of 1.6%. It continues to benefit from trade; eighty percent of all U.S. economic growth in 2008–2009 is projected to be derived from exports of goods and services, and exports have been climbing at an annual rate of eight percent—six times the rate of increase in imports.[25] Six hundred forty-two billion dollars worth of U.S. imports in 2003 from middle and low-income nations continue to support economic development through trade.[26] Nevertheless, long-standing U.S. policy continues to provide extensive protection to agriculture commodities, steel, textiles and clothing, among others. Even the nearly $2 billion in annual cotton subsidies that are destroying cotton farmers in some African countries do not raise questions of fairness for most U.S. lawmakers.[27]

Other examples of U.S. protectionism abound. The provisions in the DR-CAFTA that provided for an increase of the regional sugar quotas to just over one percent of the U.S. market sparked a strong adverse reaction from the U.S. sugar industry.[28] The apparel provisions attracted intense criticism from textile

24. Office of the United States Trade Representative, Trade Facts: Bipartisan Trade Deal (May 2007), *available at* http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2007/asset_upload_file127_11319.pdf [hereinafter BTD].

25. C. Fred Bergsten, *Trade Has Saved America from Recession*, FIN. TIMES, June 30, 2008, *available at* http://www.ft.com/cms/s/0/d87f2158-46a4-11dd-876a-0000779fd2ac.html?nclick_check=1.

26. Ambassador Linnet Deily, Opening Statement at the U.S. Trade Policy Review (Jan. 14, 2003), *available at* http://geneva.usmission.gov/press2004/0114DeilyTPR.htm.

27. *See* Jayne Thomisee, *The Cotton Debate: A Global Industry Argues Over Government Subsidies*, 18 WORLDVIEW MAGAZINE (Fall 2005), *available at* http://www.worldviewmagazine.com/issues/article.cfm?id=163&issue=39.

28. *See* Rossella Brevetti, *Costa Rica and U.S. Reach Trade Deal in CAFTA Negotiations*, 21 INT'L TRADE REP. 200 (2004).

producers and their workers.[29] Despite Australia's close security and political relationship with the United States, the AFTA provides Australia with *no* additional access to the U.S. sugar market and only modestly increases its access to U.S. beef and dairy product markets.[30] Karl Rove, who then served as senior adviser to President Bush, reportedly instructed the U.S. negotiators that increased sugar quotas could not be incorporated into the FTA with Australia.[31]

The U.S. political system is unique when it comes to trade negotiations. As one prominent foreign negotiator has observed, "when you negotiate with the U.S., you have no choice but to negotiate not only with the administration but also with the United States Congress, U.S. business and industry and the civil society."[32] The same diplomat noted that the United States also requires extensive time to reach consensus at the inter-agency level, to conduct necessary consultations with Congress and business interests, and to reflect the views of a vibrant civil society.[33]

Neither the Republicans nor the Democrats alone bear responsibility for the upsurge in protectionist measures. The 2002 farm bill, which increased annual farm subsidies by more than $10 billion annually to a level of about $19 billion annually and prompted criticism by nations such as Brazil for potentially undermining the FTAA negotiations,[34] was a broadly bipartisan effort.[35] Despite Bush administration efforts to convince Congress not to enact a farm bill "that moves backward in our trade negotiations" and "contains

29. *See* Elizabeth Becker, *A Pact on Central American Trade Zone, Minus One*, N.Y. TIMES, Dec. 18, 2003, at C1.

30. *See U.S., Australia Reach Deal That Excludes Sugar; Offers Some Beef, Dairy Openings*, 22 INSIDE U.S. TRADE (Feb. 8, 2004). Australia currently enjoys a relatively large sugar quota of 87,000 tons. *See also* Paul Blustein, *U.S. and Australia Agree on Free-Trade Pact; Bush Administration Maintains Protection Against Sugar, Beef, Dairy Imports*, WASH. POST, Feb. 9, 2004, at A17.

31. *See Top Political Advisor Played Role in Removing Sugar from Australia FTA*, 22 INSIDE U.S. TRADE 1 (Feb. 13, 2004).

32. Tommy Koh, *The USSFTA: A Personal Perspective*, *in* THE UNITED STATES SINGAPORE FREE TRADE AGREEMENT: HIGHLIGHTS AND INSIGHTS 10 (Tommy Koh & Chang Li Lin, eds., 2004). Koh was the principal negotiator for Singapore of the FTA.

33. *Id.* at 11–13.

34. *See* Chris Rugaber, *Zoellick Defends Farm Bill Against Foreign Critics, Says Other Nations Worse*, 19 INT'L TRADE REP. 829 (2002) (quoting Reps. Cal Dooley (D-Cal.) and John Boehner (R-Ohio) that "[t]here is little doubt that under this bill we will exceed [the $19.1 billion limit]"). Under the WTO Agreement on Agriculture, the U.S. limit for trade-distorting subsidies is $19.1 million annually, and some believed that the new legislation would result in the United States exceeding this limit. *Id.*

35. *See* Derrick Cain, *Farm Bill Conferees Complete Details; House, Senate Likely to Vote This Week*, 19 INT'L TRADE REP. 784 (2002) (quoting then Senate Majority Leader Tom Daschle (D-S.D.) as indicating that Democrats would overwhelmingly support the bill).

elements that are going to get challenged" in the WTO,[36] the Food, Conservation and Energy Act of 2008[37] was enacted over the President's veto with huge bipartisan margins.[38] The generous farm subsidy program, which may well lead to "Amber Box" subsidy levels above the U.S. scheduled commitments, received support not just from the expected congressional delegations and senators from farm states, but also from many congressional representatives of urban areas.[39] The latter group supported the Act because it included increases in funds available for nutrition programs such as food stamps, school lunches, and such environmental measures as reducing pollution in Chesapeake Bay.[40] The $307 billion package included over $70 billion for five years of expanded farm subsidies despite record grain prices and farm income.[41]

A few high administration officials, including at various times Office of the United States Trade Representative ("USTR") Ambassador Zoellick, Deputy USTR Peter Allgeier and Under Secretary of Commerce Grant Aldonas, demonstrated an unquestioned commitment to free trade from 1995 to 2005. A broader commitment within the U.S. government has often been lacking despite regular—if at times dispassionate—support from President Bush. Since 2005, enthusiasm for freer trade has further eroded as a result of disillusionment over the WTO's Doha Round and the failed Free Trade Agreement of the Americas ("FTAA") negotiations. Even in its current relations with Mexico, the U.S. Government has focused on relatively minor "tweaking" of the NAFTA relationship. The current discourse of the "Partnership for Security and Prosperity" indicates no support—except perhaps in Mexico—for wider and deeper economic integration in North America.[42]

36. *USDA Chief Says Administration-Congress Talks on Farm Bill Advance*, 26 INSIDE U.S. TRADE (Feb. 11, 2008) (quoting Agriculture Secretary Ed Schafer).

37. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 112 Stat. 1651 (2008).

38. David Stout, *Farm Bill, in Part and in Full, Wins Passage*, N.Y. TIMES, May 23, 2008, at A23. The vote was 82-13 in the Senate and 316-108 in the House of Representatives. *Id.*

39. Erik Wasson, *New Farm Bill Program Complicates Compliance With U.S. Doha Offer*, 26 INSIDE U.S. TRADE 1, 24–25 (2008).

40. *See* Derrick Cain, *Senate Approves $288 Billion Farm Bill by Veto-Proof Margin; White House Softens*, 24 INT'L TRADE REP. 1795 (2007) (discussing the various provisions of the senate bill).

41. Letter from Peter Orszag, Director, Congressional Budget Office, to Senator Tom Harkin, Chairman, Committee on Agriculture, Nutrition, and Forestry (May 13, 2008), *available at* http://www.cbo.gov/ftpdocs/92xx/doc9230/hr2419conf.pdf. *See also*, Jan Biles, *Shortcomings Seen in $290 Billion Farm Bill*, TOPEKA CAPITAL-JOURNAL, May 16, 2008, *available at* http://www.cjonline.com/stories/051608/bus_279578300.shtml.

42. Rossella Brevetti, *NAFTA Leaders Agree to Steps to Boost Competitiveness, Fight IP Piracy*, 24 INT'L TRADE REP. 1213 (2007) (discussing the results of a meeting of NAFTA presidents in Canada).

The United States is best at approving major trade agreements such as NAFTA, the Uruguay Round of GATT negotiations and the WTO accession agreement with China when both political and economic imperatives exist to do so. Even the most free-trade-oriented U.S. administrations will likely fail to overcome the domestic political opposition that typically pervades negotiations unless there is both enormous pressure from the business community to move forward, and some semblance of bipartisan support in Congress. One scholar, Peter Kleen, has opined that a "critical factor" for success in trade negotiations is strong support from the business community and civil society: "[A]ll parts of society—not just trade officials—must be committed to furthering multilateral trade liberalization."[43]

During most of the mid to late 1990s, the major concern of business, for perfectly good economic reasons, was assuring WTO membership for China and supporting the conclusion of the WTO's Information Technology Agreement. Hence, the collective U.S. business community never appeared either solidly behind the FTAA or significantly concerned with efforts by the Clinton and Bush administrations to conclude FTAs with small trading nations in Latin America or the Middle East.[44]

It is also unfair to criticize former President Clinton too strongly for not pushing forward with the FTAA, or with the Chile and Singapore FTAs, given his earlier strong support for the passage of NAFTA and the Uruguay Round agreements. Two of his major constituencies—the labor unions and environmentalists—generally have opposed freer trade. Few top level officials in either the Clinton administration (except those noted above) or the Republican Congress were prepared to publicly tout the benefits of freer trade, and the business community sat on its hands.

When President Clinton finally proposed negotiations with Chile and Singapore during the last several months of his administration, the objective articulated by U.S. Trade Representative Charlene Barshefsky was a circumscribed form of FTA resembling the U.S. FTA with Jordan, rather than a comprehensive agreement such as NAFTA.[45] The U.S.-Jordan FTA

43. Press Release, Peter Kleen, European Center for International Political Economy, So Alike and Yet so Different: A Comparison of the Uruguay Round and the Doha Round (Apr. 1, 2008), *available at* http://www.ecipe.org/press/PressreasePeterKleen_SoAlikeandYetso Different.pdf.

44. As a National Association of Manufacturers vice president said after one of the inconclusive FTAA negotiating sessions, "This is not what we wanted, and we have serious concerns, . . . [b]ut the alternative, allowing the talks to collapse because a way could not be found to bridge the gap with Brazil, would have been a disaster for all." *NAM Lends Support to FTAA Declaration*, CALTRADE REP., Nov. 19, 2003, *available at* http://www.caltradereport.com/eWebPages/in-brief-1070318863.html.

45. Ralph F. Ives, *The USSFTA: Personal Perspectives on the Process and Results*, *in* THE UNITED STATES SINGAPORE FREE TRADE AGREEMENT: HIGHLIGHTS AND INSIGHTS, *supra* note

incorporated labor and environmental provisions acceptable to many members of the Democratic Party in Congress (but opposed by the Republicans) that the Clinton administration wanted to lock in for future FTAs.[46] Clinton administration officials also thought—wrongly as it turned out—that they could complete a short and simple agreement with Singapore and Chile within the last few months of the administration.[47]

The Bush administration, under the direction of Ambassador Zoellick, opted to pursue instead an FTA model based on NAFTA, a "comprehensive, world-class agreement" as one of the U.S. negotiators termed it.[48] The NAFTA-like Chile and Singapore FTAs ultimately became the templates for the many U.S. FTAs that followed, with appropriate modifications to deal with an individual country's situation. The negotiations could not be completed until the enactment of TPA in August 2002. Notably, despite the administration's decision to offer "safeguards" to the domestic steel industry, TPA passed in the House of Representatives by only three votes after a long and sometimes acrimonious debate.[49]

In recent years "outsourcing" increasingly has become a campaign issue at the congressional and senatorial level, though the focus of concern has primarily remained China and India, rather than the U.S. FTA partners. The overseas migration of perhaps 250,000 to 500,000 high-paying service jobs over the past few years to countries such as India seems to have had a disproportionate effect on traditional supporters of free trade in business, Congress and the Executive Branch. Perhaps this is because, as some have suggested, their neighbors are directly affected by the loss of these positions; but in any event, it is unsettling.[50] Much of this criticism may be misplaced and illogical. As Professor Jagdish Bhagwati has observed, sending such service jobs overseas is "no different than importing labor-intensive textiles and other goods."[51] While this may prove true, many U.S. policy makers and the public perceive the offshore movement of jobs as a threat.

32, at 23, 25. Ives was the principal U.S. negotiator for the Singapore FTA. (The Jordan FTA model had nineteen *articles* rather than twenty-two *chapters*, as in NAFTA.)

46. Koh, *supra* note 32, at 15 (discussing the differences in approach between the Clinton and Bush administrations).

47. Ives, *supra* note 45, at 25.

48. *Id.*

49. 19 U.S.C. § 3801 (2002); Rossella Brevetti, Fawn Johnson & Brett Ferguson, *Bush Signs TPA Bill After Senate Approval, Will Pursue Free Trade with Other Nations*, 19 INT'L TRADE REP. 1369, 1378 (2002) (noting that the House vote was 215-212 and the Senate approved TPA by a vote of 64-34).

50. Bob Davis, *Migration of Skilled Jobs Abroad Unsettles Global-Economy Fans*, WALL ST. J., Jan. 26, 2004, at A1. Such concerns were apparently raised repeatedly at Davos, Switzerland, in January 2004, by persons who are overwhelmingly free traders.

51. Jagdish Bhagwati, Op-Ed., *Why Your Job Isn't Moving to Bangalore*, N.Y. TIMES, Feb. 15, 2004, at 11.

Given this climate, public support for freer trade declined even during the consistent, if limited, economic expansion during most of the period between 2000 and 2007. During this time, at least forty percent of Americans believed that trade barriers were being lowered too quickly, even though most favored increased trade in principle.[52] Even on the Republican side, views have been divided. Recent polls indicate a belief among a significant majority of Republican voters that free trade is bad for the economy.[53] In the Senate, which is traditionally more free-trade oriented than the House, it is possible to obtain significant majorities for politically popular anti-trade actions that are flagrantly in violation of U.S. obligations under regional trade agreements. For example, in September 2007, the Senate passed by a 74-24 margin an amendment to an appropriations bill that denied funds to the Department of Transportation to fund a pilot program permitting Mexican trucks to carry international cargos into the United States.[54] The U.S. government has delayed implementation of this obligation for nearly twelve years on largely spurious safety and environmental grounds. President Bush effectively refused to implement blocking legislation, but the fledgling pilot program was blocked by U.S. legislation in March 2009.[55]

Also in 2007, several Democratic senators reportedly actively discouraged the citizens of Costa Rica—the only DR-CAFTA nation that had not approved the FTA—from voting in favor of the Agreement in a national referendum. The senators provided very public support to anti-DR-CAFTA forces in Costa Rica,[56] notwithstanding the BTD. Costa Ricans ultimately approved DR-CAFTA.[57] This only occurred, however, after an unseemly debate between the Bush administration and some Democratic members of Congress, during which the administration warned Costa Rica both that it would not renegotiate the agreement and that continued access to Caribbean Basin Initiative unilateral tariff preferences should not be assumed. At the same time, the

52. Gary G. Yerkey, *President Bush's Handling of Trade Issues Seen as Negative for Re-election Prospects*, 21 INT'L TRADE REP. 173, 181 (2004).

53. John Harwood, *Republicans Grow Skeptical on Free Trade*, WALL. ST. J., Oct. 4, 2007, at A1.

54. Karen L. Werner, *Senate Adopts Dorgan Amendment Prohibiting Mexican Truck Program*, 24 INT'L TRADE REP. 1270 (2007) (reporting on the Senate vote). Mexican truck access to the border-states was required as of December 1995. NAFTA, *supra* note 9, Annex I-U-18.

55. *DOT to Continue Mexican Truck Project Despite Spending Prohibition*, 26 INSIDE U.S. TRADE (Jan. 4, 2008) (explaining the Bush administration position that the prohibition does not apply to the pilot program established in September 2007). *See* Editorial, *A Small and Dangerous Spat*, N.Y. TIMES, Mar. 19, 2009, at A30 (decrying the protectionism reflected in the ban).

56. Mary Anastasia O'Grady, Op-Ed., *Democrats vs. Central America*, WALL ST. J., Oct. 1, 2007, at A22.

57. Gary G. Yerkey & Amy Tsui, *U.S. Welcomes Costa Rica's CAFTA Approval; Passage of FTA Neutralizes CBI Controversy*, 24 INT'L TRADE REP. 1435 (2007).

Democrats, many of whom remain generally opposed to free trade agreements and unilateral tariff preferences despite the BTD, countered that the unilateral tariff benefits might be continued even if Costa Rica voted "no."[58]

One thus sees a basic, not necessarily logical, shift away from the United States' post-World War II support for increased trade through new trade agreements and reduced tariff and non-tariff barriers. Whether such opposition will be short-lived or will deepen as a result of Obama administration and congressional policies cannot be determined at this time, in part, because of the protectionist pressures generated by the worldwide recession.

B. Prospects and Concerns for 2009 and Beyond

In 2008 continuing into 2009, several factors made it difficult for the United States to exercise the leadership and make the compromises necessary to rescue the floundering WTO Doha Round trade negotiations. These factors have included not only general public concerns with free trade and uncertainties over the costs and extent of U.S. farm subsidies in the new Act, but also the expiration of TPA. The difficulties surrounding the Doha Round negotiations would exist even if the United States had been able to provide strong support for moving forward, since none of the major participants—the European Union, India, China and Brazil among—had the political will in 2008 to support a successful conclusion to these negotiations.[59] They likely will not have the necessary support in 2009 either. Nor does it seem likely that the United States will initiate any new FTAs beyond the group already concluded under TPA even though changes could be made that would make the agreements more consistent with Democratic congressional views on trade policy.[60]

Eventual approval of the pending FTAs with Colombia, Panama and South Korea depends not only on the agreement-specific factors discussed in Part V but also on the linkage between congressional approval of the FTAs and congressional enactment of Trade Adjustment Assistance ("TAA"). The connection between supporting free trade through the FTAs and protecting U.S. workers who lose their jobs because of foreign competition is particularly

58. Editorial, *Victory for Costa Rica: The Central American Democracy Approves Free Trade with the United States*, WASH. POST, Oct. 9, 2007, at A16. The benefits are provided under the Caribbean Basin Economic Recovery Act ("CBERA"). 19 U.S.C. § 2701 (2000).

59. The most recent effort to revive the Doha Round discussions collapsed at the end of July 2008, ostensibly over the refusal of India to agree to a package without the inclusion of new protection for its farm sector. *See* Anthony Faiola & Rama Lakshmi, *Trade Talks Crumble in Feud Over Farm Aid*, WASH. POST, July 30, 2008, at A1 (discussing the reasons for the collapse and the impact on future trade negotiations).

60. Daniel Pruzin, *U.S. Politics Dim Renewal of WTO Talks on Farm Trade; EU Warns U.S. on Subsidies*, 24 INT'L TRADE REP. 1232 (2007) (discussing the effect of U.S. political constraints on the Doha negotiations).

important both in an election year and at a time when the U.S. job losses are mounting because of the recession. Among other considerations, TAA provides some "cover" to pro-trade members of Congress who may be vilified if they support FTAs. Thus, it is not surprising that Senate Finance Chairman Max Baucus—historically a strong supporter of freer trade—indicated that he was willing to consider other trade bills in 2008 only after Congress enacts a "strong" trade adjustment assistance package.[61] (TAA was not enacted in 2008 and none of the pending FTAs were approved, but TAA seems likely to be enacted in 2009.)

With very few exceptions, advocacy of freer trade policies did not likely help any candidate, Democrat or Republican, win presidential, senate or house elections in November 2008 even though such positions may have stimulated financial support from the business community. Thus, being labeled as pro-trade has more downside risk than upside benefit. This has been the situation for at least the last four years.[62] During the 2008 presidential election, now President Barack Obama initially adopted a cautiously positive position on trade issues. Specifically, he indicated a realization that globalization will not go away, which meant that the United States must prepare to deal with both its advantages and disadvantages. He has also supported efforts to enable U.S. workers and enterprises, particularly the high-technology variety, to compete more effectively against foreign workers.[63] In the primary season, Obama's primary rival, then Senator Hillary Clinton, advocated "smart trade" and a "time out" on future U.S. trade agreements, as well as possible reconsideration of NAFTA.[64] Both major Democratic Party candidates and many other politicians supported U.S. auto industry opposition to the FTA with South Korea.[65]

Beginning with the debates leading up to the Ohio presidential primary, Clinton and Obama were extremely critical of NAFTA, each threatening to opt out of NAFTA unless Mexico and Canada agreed to renegotiate. They both suggested, without offering any evidence, that the improved enforcement of labor and environmental laws in Mexico that they promised to seek in a renegotiated NAFTA would somehow restore lost manufacturing jobs in Ohio,

61. *Baucus Says TAA Must Precede Other Trade Bills; Markup in Coming Weeks*, 26 INSIDE U.S. TRADE 1, 7 (2008).

62. Yerkey, *supra* note 52.

63. David Ranson, Op-Ed., *The Candidates and Trade*, WALL. ST. J., Feb. 6, 2008, at A19.

64. *Id.*

65. Editorial, *Korean Boon?*, THE PRESS-ENTERPRISE, Aug. 12, 2007, *available at* http://www.pe.com/localnews/opinion/editorials/stories/PE_OpEd_Opinion_D_op_13_ed_sokotrade1.5527a9.html# (criticizing "top Democrats" for pandering to the big labor interests in the United States by opposing KORUS).

Pennsylvania and elsewhere.[66] Neither explained why Canada and Mexico—respectively the number one and number four sources of U.S. petroleum imports—would be prepared to renegotiate NAFTA without the negotiations addressing issues of interest to them as well as matters of concern to the United States.

Senator McCain, the Republican nominee, expressed a very different point of view, seeing free trade as a "continuing principle that guides this nation's economy" and advocating reducing ethanol and other agricultural subsidies.[67] In the past Senator McCain supported NAFTA, as well as the pending FTA with South Korea, and vehemently rejected renegotiation of NAFTA, characterizing NAFTA as a "fundamental necessity if our economy's going to improve."[68]

Later in the campaign, President Obama's views moderated. He endorsed an increase in U.S. assistance to the Americas and pledged to continue supporting the counter-drug program and anti-terrorist U.S. aid to Colombia, although still opposing the FTA "because the needs of workers were not adequately addressed."[69] In partial response to criticism from Senator McCain, President Obama withdrew his unilateral demand for renegotiation of NAFTA "or else," calling instead for a "dialogue" with Mexico and Canada to address job losses associated with NAFTA, and he asserted that "I'm not a big believer in just doing things unilaterally."[70] The President's commitment to "upgrade" NAFTA was reiterated in a meeting with Mexican President Calderon in mid-January 2009 although he also advocated "port of entry modernization and improvements on the Mexican border to facilitate legal trade and commerce."[71]

The principal risk in the heated campaign was that the Democratic candidates would stake out positions using rhetoric that frightened our trading partners at the time and make it more difficult in 2009 for either President Obama or Congress to follow responsible international economic policies without appearing to repudiate campaign promises. The posturing may well

66. Gary G. Yerkey, *Clinton, Obama Vow to 'Opt Out' of NAFTA Unless Mexico, Canada Agree to Renegotiate*, 25 INT'L TRADE REP. 349 (2008).

67. Ranson, *supra* note 63.

68. Gary G. Yerkey, *Sen. McCain Opposes Reopening NAFTA, Calls Free Trade*, 25 INT'L TRADE REP. 923 (2008) (quoting Senator McCain at a news conference).

69. Senator Barack Obama, Renewing U.S. Leadership in the Americas, Address to Cuban American National Foundation (May 23, 2008), *available at* http://www.barackobama.com/2008/05/23/remarks_of_senator_barack_obam_68.php.

70. Gary G. Yerkey, *Sen. Obama Calls for Dialogue With Canada, Mexico to Fix 'Costs' of NAFTA*, 25 INT'L TRADE REP. 958 (2008).

71. *Obama Pitches "Consultative Group" on NAFTA to Mexican President*, 27 INSIDE U.S. TRADE 2 (Jan. 16, 2009). When I addressed an American Chamber of Commerce group in Santiago in March 2008, there were concerns that the Obama/Clinton threats of NAFTA renegotiation would result in a demand for renegotiation of the U.S.-Chile FTA as well.

"remove the United States from any significant international trade negotiations in the foreseeable future," as C. Fred Bergsten has warned.[72] Perhaps more likely, it may simply complicate governing for the Democratic congressional leadership and for President Obama in 2009 and beyond.

For some foreign nations, particularly in Latin America, U.S. international economic policy is just as important as U.S. international security policy. Arrogant and unilateral demands on trade issues can undermine U.S. credibility in the world and ultimately work against broader U.S. interests, just as they have on international security issues in recent years.[73] Causing stalwart U.S. allies such as Chile to worry that President Obama would seek revision of trade agreements even if no one has publicly mentioned Chile in that context, is hardly the best way to build U.S. economic and political influence in Latin America.[74] As a former Mexican foreign minister has observed, "What does Mexico or Chile care about who rules in Baghdad? [The Iraq War] was about how the world's superpower wields its power. That's something we all deeply care about."[75]

One of the ironies of this misplaced criticism of NAFTA and, by implication, other FTAs is that even FTAs such as NAFTA, with its more than $900 billion worth of annual intra-regional trade, have relatively minor economic impact on the U.S. economy as a whole[76] despite the fact that they cause pain at the micro level when jobs are lost. Subsequent FTAs cover only a fraction of the amount of trade under NAFTA and thus have no measurable impact on the U.S. economy as a whole. However, for small, developing countries, particularly those with only a few major export products, the impact may be enormous and beneficial. This means that FTAs with developing countries can be a useful tool for encouraging global free trade, democratic institutions, the rule of law and other major U.S. foreign policy objectives without any appreciable cost to the U.S. economy as a whole.[77]

72. C. Fred Bergsten, Op-Ed., *The Democrats' Dangerous Trade Games*, WALL ST. J., May 20, 2008, at A23.

73. Andrés Oppenheimer, Op-Ed., *Dems' Free Trade Rhetoric Could Harm U.S.*, ARIZ. DAILY STAR, Mar. 4, 2008, *available at* http://www.azstarnet.com/sn/byauthor/227963 (noting the inaccuracies of the NAFTA criticism and how such statements play in Latin American nations such as Colombia).

74. When I spoke to an American Chamber of Commerce group in Santiago on March 14, 2008, this was one of the major questions among businesses represented there.

75. Jorge Castañada, *quoted in* FAREED ZAKARIA, THE POST-AMERICAN WORLD 228 (2008).

76. J.F. HORNBECK, CONG. RESEARCH SERV., NAFTA AT TEN: LESSONS FROM RECENT STUDIES, 2–4 (2004) (concluding that NAFTA slightly increased U.S. GDP growth by roughly 0.04%, had little impact on aggregate U.S. employment and modestly stimulated U.S.-Mexico trade and U.S. investment in Mexico).

77. CONG. BUDGET OFFICE, THE PROS AND CONS OF PURSUING FREE-TRADE AGREEMENTS 1, 7 (2003). There is some cost in terms of loss of tariff revenues and providing technical

Three months after the 2008 election the Obama Administration's international trade policy directions were still difficult to discern without a clearer crystal ball than the author's; early signals are mixed. On the positive side, the President's senior economic adviser, Lawrence Summers and his Secretary of the Treasury, Timothy Geithner, are among other economic advisers known to favor centrist economics and open markets.[78] However, within forty-eight hours of the Inauguration, Mr. Geithner (presumably reflecting the President's views) intentionally stepped up the rhetoric in accusing the Chinese of currency manipulation,[79] an approach that is at least somewhat risky given that U.S. imports of Chinese goods are slowing, China remains a major creditor of the United States and China's cooperation will be needed to deal with the world recession and future global trade negotiations.

Former senator Hillary Clinton, hardly a supporter of an open trade policy, as the presidential primaries indicated, is now Secretary of State and likely will be one of the most powerful members of the Cabinet. According to reports, Clinton told United States Agency for International Development ("USAID") officials, "I wanted to come here today with a very simple message . . . I believe in development, and I believe with all my heart that it truly is an equal partner, along with defense and diplomacy, in the furtherance of American's national security.[80] It is difficult to imagine a successful development policy that does not depend at least in part on encouraging developing nation trade and affording such nations access to the U.S. market.

In contrast, another prominent member of in the Cabinet, Secretary of Labor, Hilda Solis, has adopted the anti-trade sentiments of her constituencies, including strong opposition to NAFTA.[81] The President's first choice for U.S. Trade Representative, Congressman Xavier Becerra, declined on the grounds that trade policy would not be a priority for the Obama administration; the confirmed USTR, Ron Kirk of Texas, is known to have pro-trade views, at least on NAFTA, but his lack of trade credentials is initially disappointing to those who hoped for a trade expert in the USTR position.[82]

assistance, but these are usually minimal, since under various existing preference programs, most imports from FTA partner countries already enter the United States duty-free.

78. Trineesh Biswas, *How is President Obama Likely to Deal with Trade?*, International Centre for Trade and Sustainable Development, vol. 12, no. 6, Dec. 2008, at 2, *available at* http://ictsd.net/i/news/bridges/37976/.

79. Lory Montgomery & Anthony Fiola, *Geithner Says China Manipulates Its Currency*, WASH. POST, Jan. 23, 2009, at A08 (quoting Secretary of the Treasury Timothy Geithner).

80. *Clinton Pledges More Support for Development Aid*, RTT NEWS, Jan. 23, 2009, *available at* http://www.rttnews.com/Content/Policy.aspx?Id=833193.

81. Jagdish Bhagwati, *Obama and Trade: an Alarm Sounds*, FINANCIAL TIMES, Jan. 9, 2009, at 9.

82. *Id.*

Still, Senators Obama, Clinton and McCain supported the Peruvian Trade Promotion Agreement in December 2007.[83] They were not alone. The BTD between the Bush administration and the Democratic congressional leadership apparently resolved key issues of disagreement regarding labor and environment, and lesser concerns relating to investment, intellectual property and national security. Once the deal was concluded in May 2007,[84] a significant number of Democrats in Congress joined Republicans in passing the necessary implementing legislation for the Peru Trade Promotion Agreement ("PTPA").[85] It remains unclear whether this was just an aberration or whether such action on PTPA will be followed by similar action on some or all of the other pending FTAs in 2009.

President Obama, whether one characterizes the ensuing process as a "time out" as Senator Clinton has done, will inevitably require a period of four to six months during which he assembles an economic policy team and devises a set of policies including those related to global and regional trade agreements. This is entirely reasonable; there is no reason to assume that the Bush administration trade policies are necessarily the best ones for the country or should not be substantially altered after nearly eight years without major review. Still, the infrequency of any public statements of support by the President or presidential advisers for the importance of maintaining an open trading system and completing the Doha Round in Geneva is troubling.[86] Moreover, judging by initial legislative efforts, Congress is likely to be much more interested in strengthening U.S. trade remedies against actual or imagined "unfair trade," seeking redress of foreign market restrictions through enforcement rather than through trade negotiations[87] and enacting "Buy American" provisions in economic stimulus legislation. Many believe that such provisions are inconsistent with recent U.S. pledges to refrain from raising new trade and investment barriers if not with WTO obligations, and could encourage other major nations to follow suit.[88]

As President Obama recognizes, the economic challenges of globalization and declining world trade, including but not limited to the world financial

83. *How Have Clinton, McCain, and Obama Been Voting on Trade Issues?,* The Custom-House, Feb. 3, 2008, http://benmuse.typepad.com/custom_house/2008/02/how-have-clinto.html.

84. BTD, *supra* note 24.

85. Peru TPA, *supra* note 18, art. 17.1. *See* GANTZ, *supra* note 1, ch. 9.

86. Bhagwati, *supra* note 81.

87. *See H.R. 496, The Trade Enforcement Act of 2009,* Jan. 15, 2009, *available at* http://www.insidetrade.com/secure/pdf13/wto2009_0254b.pdf (advocating various legislative and administrative actions to eliminate foreign trade barriers and "restore and enhance" U.S. trade remedies).

88. *See* Amy Tsui, *Business Groups Urge Congress to Reject "Buy American" in Stimulus Bill,* 26 INT'L TRADE REP. 147, Jan. 29, 2009 (reporting on business group testimony before Congress).

crisis and the first likely decrease in world trade in twenty-five years,[89] will dominate 2009 and perhaps the several years beyond. Even if the President moves slowly in deciding what to do with global trade negotiations and the pending FTAs, he will face the need to develop a rational policy to react to the new FTAs that will likely be concluded by other major trading nations such as the EU, China, and South Korea, and with protectionist actions (whether or not WTO illegal) elsewhere designed to protect local jobs at the expense of imports.[90] These challenges are in addition to pressing international economic issues related to the declining value of the dollar, high oil prices and the troubled U.S. economic relationship with China. Thus, even if the pessimists on trade have misjudged the President, the prospect of at least a period of not-so-benign neglect of international trade issues seems real.

Most of the U.S. FTAs, particularly those with small, developing nations, will meet their trade and development objectives only with both technical assistance and frequent encouragement from the United States. This is especially true in the areas of transparency and in assuring the availability of administrative and judicial courts for customs and commercial disputes and intellectual property enforcement. Also, President Obama has an opportunity under all of the existing FTAs to provide financial assistance and encouragement, along with diplomatic pressure as needed. Such steps would likely lead to better observation of labor rights and enforcement of environmental laws. If, as seems likely, any U.S. effort to renegotiate NAFTA is recognized as impractical, a good alternative would be to improve the functioning of existing labor and environmental provisions.

III. TRADE PROMOTION/FAST-TRACK NEGOTIATING AUTHORITY

Despite the efforts of U.S. Trade Representative Susan Schwab to continue negotiations in Geneva throughout 2007 and 2008, TPA expired June 30, 2007, drastically curtailing U.S. negotiating authority. The window of opportunity for concluding the Doha Round, the FTAA and new bilateral FTAs has effectively closed, likely to re-open only in 2010 or later. Since the first fast-track legislation was enacted in 1974,[91] Congress periodically has provided presidents with TPA, known as "fast-track" until 2002, in recognition of the

89. The World Bank has predicted that global trade will decrease by 2.1% in 2009. World Bank, *Historic commodity price boom ends with slowing global growth*, Dec. 9, 2008, *available at* http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/0,,contentMDK:22004555~pagePK:64165401~piPK:64165026~theSitePK:469372,00.html (last visited Jan. 5, 2009).

90. The decision to subsidize the American "Big Three" auto producers, while in the author's view a wise economic policy decision under the circumstances, nevertheless sends the wrong signal to other WTO member governments.

91. Trade Act of 1974, Publ. L. No. 93-618, 88 Stat. 1978 (1975) (codified at 19 U.S.C. §§ 2101–2497 (2000)).

importance of trade to national security and economic growth.[92] TPA has occasionally been withheld, most recently after July 1, 2007, and from May 1994 until August 2002. The only major U.S. trade agreement to be successfully concluded without fast-track authority was the Jordan FTA in 1999.[93] Congress refused to approve the implementing legislation for that FTA until just after September 11, 2001, when political and security issues in the Middle East triumphed over trade considerations.[94]

Still, the expired version of TPA warrants exploration given the probability that when and if TPA is renewed, it will resemble the 2002 version, likely with changes reflecting the BTD and other developments since 2007.

A. General Considerations

For eminently practical reasons, most foreign governments are unwilling to complete substantive trade negotiations with the United States in the absence of TPA. Under TPA, Congress has limited its authority so that it may only vote "yes" or "no" on a trade agreement. Congress can neither amend any provisions nor unduly delay consideration of the agreement and the implementing legislation once the President has submitted it to the Congress.[95] In the absence of TPA, Congress has the ability to demand amendment of a trade agreement so as to make the agreement more attractive to Congress and inevitably less attractive to the foreign governments,[96] or it may simply delay action indefinitely. Logically enough, foreign governments want to avoid both of these negative effects. The Kennedy Round of GATT negotiations most clearly illustrated this problem, as Congress declined to vote on two of the major negotiated components, prompting anger by the European Communities and a pledge that they would not negotiate again with the United States without assurances that such a result would not happen again.[97]

TPA is not a one-way street. In return for agreeing to limit debate and conduct only an up-or-down vote without amendments, Congress imposes detailed substantive criteria on the President for conducting trade negotiations. In addition, TPA requires the President to obtain permission, in a process that effectively permits a congressional veto, before he may negotiate each specific

92. H.R. CONF. REP. NO. 107-624, at 149–150 (2002) (Conf. Rep.) (noting that the expansion of international trade is vital to U.S. world leadership). For an excellent and exhaustive discussion of TPA/Fast-Track, see HAL S. SHAPIRO, FAST TRACK: A LEGAL, HISTORICAL AND POLITICAL ANALYSIS (2006).

93. U.S.-Jordan FTA, *supra* note 10.

94. *See* GANTZ, *supra* note 1, ch. 8.

95. 19 U.S.C. § 3805(b)(2) (Supp. 2002).

96. *See* Leslie Alan Glick, *World Trade After September 11, 2001: The U.S. Response*, 35 CORNELL INT'L L.J. 627, 637–38 (2002) (discussing Congress' opposition**,** on constitutional and other grounds, to TPA because of these limitations on congressional power).

97. Bergsten, *supra* note 25.

agreement.[98] Moreover, consultations with Congress are required throughout the negotiating process. The agreement must be presented to Congress at least ninety days before either the President or his delegate may sign it.[99] Congressional consideration does not begin until the President transmits the final agreement to Congress. The agreement must be accompanied by a complete draft of the implementing legislation and a "Statement of Administrative Action" explaining what changes in U.S. law are required and demonstrating that the agreement is consistent with the stated negotiating objectives in the TPA legislation.[100]

TPA also provides for a study by the U.S. International Trade Commission ("USITC") of the economic impact on the United States of each FTA. With regard to labor and environmental language in trade agreements, TPA directs the President to create consultative mechanisms to promote respect for core ILO labor standards and for protection of the environment and human health. Consultations also are required with prospective FTA partners on labor laws, with the provision of technical assistance if needed, and all include various review and reporting requirements.[101] An environmental impact assessment is also required, as are a series of trade advisory committee reports, including, but not limited to, labor and environmental issues.[102]

TPA is not a panacea. With one recent exception, a president has never sent an FTA to Congress knowing that there was a strong likelihood that it would be disapproved. However, Bush administration officials became frustrated when the Democratic Congress in late 2007 and early 2008 effectively stalled the FTAs with Panama, Colombia and South Korea by implicitly or explicitly threatening disapproval. Accordingly, President Bush decided to send the Colombia FTA forward to Congress without having consulted on implementing legislation and despite uncertainties about whether there were sufficient votes for enactment in the Congress; this may well produce the first such disapproval.[103] The immediate, also unprecedented congressional reaction, was to change the rules of the House of Representatives, obviating the need to vote on the Colombia FTA within ninety legislative days and instead permitting the House to vote on the FTA at

98. 19 U.S.C. § 3803 (Supp. 2002).

99. 19 U.S.C. § 3805(a)(1)(A) (Supp. 2002).

100. 19 U.S.C. § 3805(a)(1)(C) (Supp. 2002).

101. 19 U.S.C. § 3802(c) (Supp. 2002).

102. 19 U.S.C. §§ 3802(c), 3804(e) (Supp. 2002).

103. President George W. Bush, Remarks on the Colombia Free Trade Agreement (Apr. 7, 2008), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/04/07/AR2008040700999_pf.html (announcing his intention to send the FTA immediately to Congress so as to force a vote by the end of the session).

a time of its choosing.[104] The stalemate between President Bush and the Democratic Congress continued through the remainder of President Bush's second term, with the fate of the Colombia FTA in limbo as of early 2009, as discussed in Part V, *infra*.

B. Negotiating Objectives of TPA (2002)

The "Trade Negotiation Objectives" in the Trade Act of 2002 were designed to guide U.S. trade policy. They were applicable to trade agreements that were negotiated beginning August 6, 2002, and that were signed by March 31, 2007.[105] That group included the then-ongoing Chile, Singapore, FTAA and WTO negotiations, and subsequent FTAs concluded within ninety days of June 30, 2007, which was the day TPA expired.[106] The latter group included FTAs with Australia, Bahrain, DR-CAFTA, Colombia, Morocco, Oman, Panama and South Korea. The focus in this discussion is on the most controversial provisions, which affected investment protection, labor and the environment.

1. Overall Negotiating Objectives

The following were among the "Overall trade negotiating objectives":

> (1) to obtain more open, equitable, and reciprocal market access;
>
> (2) to obtain the reduction or elimination of barriers and distortions that are directly related to trade and that decrease market opportunities for United States exports or otherwise distort United States trade;
>
> (3) to further strengthen the system of international trading disciplines and procedures, including dispute settlement;
>
> (4) to foster economic growth, raise living standards, and promote full employment in the United States and to enhance the global economy;
>
> (5) to ensure that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources;
>
> (6) to promote respect for worker rights and the rights of children consistent with core labor standards of the ILO . . . and an understanding of the relationship between trade and worker rights;

104. *House Approves Fast-Track Rules Change for U.S.-Colombia FTA*, 26 INSIDE U.S. TRADE (Apr. 11, 2008). TPA "expressly recognizes the constitutional right of either House to change the rules" (so far as relating to the procedures of that House) at any time, in the same manner, and to the same extent as any other rule of that House. 19 U.S.C. § 3805(c)(2) (Supp. 2002). That is what the House did.

105. 19 U.S.C. §§ 3802–3803 (Supp. 2002).

106. 19 U.S.C. §§ 3805, 3806 (Supp. 2002).

> (7) to seek provisions in trade agreements under which parties to those agreements strive to ensure that they do not weaken or reduce the protections afforded in domestic environmental and labor laws as an encouragement for trade;
>
> (8) to ensure that trade agreements afford small businesses equal access to international markets, equitable trade benefits, and expanded export market opportunities, and provide for the reduction or elimination of trade barriers that disproportionately impact small businesses; and
>
> (9) to promote universal ratification and full compliance with ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor.[107]

In addition to these general negotiating objectives, which leave room for considerable negotiating discretion, specific negotiating authority was incorporated for investment, labor and environmental objectives, as discussed below.

2. Protection of Investment

Provisions for protection of foreign investment in U.S. RTAs have been among the most controversial provisions. As the Senate Report on TPA indicated, the objectives reflect an effort to reach a compromise between two conflicting goals:

> The negotiating objective on foreign investment reflects the [Senate Finance] Committee's view that it is a priority for negotiators to seek agreements protecting the rights of U.S. investors abroad and ensuring the existence of an investor-state dispute settlement mechanism. It also reflects the view that in entering into investment agreements, negotiators must seek to protect the interests of the United States as a potential defendant in investor-state dispute settlement. In other words, there ought to be a balance. Protecting the rights of U.S. investors abroad should not come at the expense of making Federal, State and local laws and regulations unduly vulnerable to challenges by foreign investors.[108]

The Senate Report also urged against future investment agreements that "confer on foreign investors in the United States a right to compensation for expropriation that differs substantially from the right to compensation for takings that U.S. citizens already enjoy."[109] The resulting negotiating authority text reflected these concerns and strove to achieve the following compromises:

> [T]he principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade-distorting barriers to

107. 19 U.S.C. § 3802(a) (Supp. 2002).
108. S. REP. NO. 107-139, at 13 (2002).
109. *Id.* at 15.

> foreign investment, *while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States*, and to secure for investors important rights comparable to those that would be available under United States legal principles and practice, by—
>
> (A) reducing or eliminating exceptions to the principle of national treatment:
>
> . . . .
>
> (D) *seeking to establish standards for expropriation and compensation for expropriation, consistent with United States legal principles and practice*;
>
> (E) *seeking to establish standards for fair and equitable treatment consistent with United States legal principles and practice, including the principle of due process* . . . .[110]

The TPA's attempted compromises failed to fully satisfy anyone. The TPA provisions were criticized for undermining U.S. legislation and for failing to fully guarantee that foreign investors will be barred from receiving protection not available to U.S. firms.[111] Others have argued that the new investment provisions weaken the protection for U.S. investors abroad.[112] By explicitly limiting protection for foreign investors in the United States in the event of takings to the rights guaranteed to U.S. citizens, without referring to the minimum requirements of international law, the United States appears to be shifting to its own version of limiting responsibility to what is required under domestic legislation alone.

3. Labor and the Environment

The most controversial of all FTA-related discussions in the United States have proven to be over whether U.S. trade agreements should include provisions relating to labor and the environment. Congressional and private opinions have varied widely, from opposing such provisions entirely to seeking assurances that any violations of trade or environmental standards are punished in the same manner as any other violations of the FTAs and that strict labor and environmental standards are included in the FTA texts.[113] Many

110. 19 U.S.C. § 3802(b)(3) (Supp. 2002) (emphasis added).

111. *See Final Trade Package Further Weakens Limits on Investor Protections*, 20 INSIDE U.S. TRADE (Aug. 2, 2002) (documenting various interest groups' opposition to the TPA).

112. *See* David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement*, 19 AM. U. INT'L L. REV. 679, 764–767 (2004) (discussing business community views on the new FTA provisions).

113. *See, e.g.*, MARY JANE BOLLE, CONG. RESEARCH SERV., JORDAN-U.S. FREE TRADE AGREEMENT: LABOR ISSUES, 2–4 (2001), *available at* http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-2030:1; Andrea N. Anderson, *The United States Jordan Free Trade Agreement, United States Chile Free Trade Agreement and the United States Singapore Free*

Republicans who found the language in TPA overly strong likely supported the compromise because of the perceived need of the Bush administration to have the necessary trade agreement negotiating authority. The actual text favored the generally limited coverage of labor and the environment espoused by the Republicans (as in the Chile and Singapore FTAs) over the broader coverage preferred by some Democrats:

The principal negotiating objectives of the United States with respect to labor and the environment are—

> (A) to ensure that a party to a trade agreement with the United States does not fail to effectively enforce its environmental or labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the United States and that party after entry into force of a trade agreement between those countries;
>
> (B) to recognize that parties to a trade agreement retain the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor or environmental matters determined to have higher priorities, and to recognize that a country is effectively enforcing its laws if a course of action or inaction reflects a reasonable exercise of such discretion, or results from a bona fide decision regarding the allocation of resources, and no retaliation may be authorized based on the exercise of these rights or the right to establish domestic labor standards and levels of environmental protection;
>
> (C) to strengthen the capacity of United States trading partners to promote respect for core labor standards[114] . . . ;
>
> (D) to strengthen the capacity of United States trading partners to protect the environment through the promotion of sustainable development;
>
> (E) to reduce or eliminate government practices or policies that unduly threaten sustainable development;

Trade Agreement: Advancement of Environmental Preservation?, 29 BROOK. J. INT'L L. 1221, 1221–22 (2004); Marley L. Weiss, *Two Steps Forward, One Step Back—Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond*, 37 U.S.F. L. Rev. 689, 689–701 (2003); Emily Harwood, Note, *The Jordan Free Trade Agreement: Free Trade and the Environment*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 509, 509 (2002).

114. "Core labor standards" means:

> (A) the right of association; (B) the right to organize and bargain collectively; (C) a prohibition on the use of any form of forced or compulsory labor; (D) a minimum age for the employment of children; and (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

19 U.S.C. § 3813(6) (Supp. 2002).

> (F) to seek market access, through the elimination of tariffs and nontariff barriers, for United States environmental technologies, goods, and services; and
>
> (G) to ensure that labor, environmental, health, or safety policies and practices of the parties to trade agreements with the United States do not arbitrarily or unjustifiably discriminate against United States exports or serve as disguised barriers to trade.[115]

The limiting provisions in paragraphs A and B, in particular, are significant. They (1) restrict the enforceable FTA obligations to enforcing a country's own labor laws; (2) limit any dispute settlement actions to those that address a "sustained or recurring course of action or inaction," rather than a single violation, regardless of how severe; and (3) preserve relatively broad legislative discretion on the part of FTA Parties, including the United States.[116] Thus, a change in national law to weaken environmental or labor provisions is *not* a violation of the Agreement. Advocates for the explicit incorporation of internationally recognized core labor standards were not satisfied. Rather, TPA's vague wording allowed President Bush to incorporate language on labor issues in FTAs which has been unsatisfactory to many members of Congress, as the subsequent BTD changes indicate.

The debate is reflected in the opposing positions of Democratic Senator Baucus and Republican Senator Grassley, both of whom acted as the Finance Committee Chairman in recent years. Baucus objected to the Chile FTA because it did not meet the standard for labor rights provisions established in the Jordan FTA.[117] In response, Grassley argued that "[s]ome members of Congress [i.e., Baucus] are even arguing that future agreements must follow the 'Jordan Standard' . . . ."[118] Grassley had earlier contended that the TPA provisions were designed to preserve the flexibility of the Executive Branch to take into account the situations in individual FTA negotiating partners.

The pro-labor, anti-FTA groups understood that the labor provisions included in most of the Bush administration FTAs, at least until the BPD, provided the U.S. government with considerably less leverage to encourage enforcement of labor rights than the provisions of the Generalized System of Preferences (permitting denial of GSP benefits for beneficiary developing countries that violate labor rights) that are effectively displaced when an FTA goes into force.[119]

115. 19 U.S.C. § 3802(b)(11) (Supp. 2002).

116. *Id.*

117. 148 CONG. REC. 19,121–22 (2002) (statement of Sen. Baucus).

118. 148 CONG. REC. 17,588 (2002).

119. *See, e.g.*, LABOR ADVISORY COMM. FOR TRADE NEGOTIATIONS AND TRADE POLICY, U.S. TRADE REP., REPORT TO THE PRESIDENT, THE CONGRESS AND THE UNITED STATES TRADE REPRESENTATIVE ON THE U.S.-MOROCCO FREE TRADE AGREEMENT 4, (Apr. 6, 2004), *available*

As to the environment, what appears to be most lacking in the Bush administration FTAs, with the exception of DR-CAFTA, is a quasi-independent NAFTA-style Commission for Environmental Cooperation ("CEC"), with a secretariat and a mandate to investigate citizen complaints.[120] In the author's view, many environmental groups may have over-emphasized the importance of binding dispute settlement and trade sanctions as an effective means of dealing with environmental concerns. Governmental attention to environmental and labor shortcomings of FTA parties in the future will likely depend more on the availability of an adequately funded independent review agency, such as the CEC, and on the willingness of the United States and its FTA partners to cooperate and provide adequate funding than on the unlikely prospect of arbitration followed by trade sanctions or monetary penalties.

Similarly, the effectiveness of such labor provisions in FTAs, like the weaker ones in earlier U.S. FTAs and the "side" agreements in NAFTA,[121] depends mostly on the willingness of the U.S. Executive Branch to both commit sufficient funds, staff and attention to such efforts and to cooperate when the citizen complaints are filed against the United States rather than against the other Parties. In other words, an administration with a high level of commitment to improving labor and environmental law enforcement at home and abroad will use the provisions more effectively than an administration that does not give such issues a high priority. In either situation, dispute settlement under any FTA is comparatively rare, regardless of the subject of the dispute. Effectiveness does not mean seeking sanctions at every opportunity but, rather, taking advantage of the existence of the treaty obligations as a basis for periodic discussion, provision of technical assistance and, where necessary, the use of firm pressure to bring about changes in laws and national enforcement mechanisms.

IV. THE 2007 BIPARTISAN TRADE DEAL

The BTD was negotiated by U.S. Trade Representative Susan Schwab and the congressional and Senate leadership for the principal purpose of obtaining

at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Morocco_FTA/Reports/asset_upload_file809_3122.pdf (asserting that the MFTA provisions are weaker than those provided under GSP). *See also* 19 U.S.C. § 2463(b)(1)(G), (c) (2000) (setting out the scope of presidential authority to deny GSP benefits).

120. *See* Commission for Environmental Cooperation, Who We Are, http://www.cec.org/who_we_are/index.cfm?varlan=english (last visited Aug. 4, 2008) (describing the mandate of the CEC under the North American Agreement on Environmental Cooperation).

121. *See* North American Agreement on Labor Cooperation, U.S.-Can.-Mex., *opened for signature* Sept. 8, 1993, 32 I.L.M. 1499 (1993), *available at* http://www.naalc.org/english/agreement.shtml; North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480 (1993), *available at* http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/index.cfm?varlan=English.

the support of the Democratically controlled Congress and Senate for the four pending FTAs with Peru, Colombia, Panama and South Korea.[122] With Democratic control of Congress beginning in January 2007, it soon became evident that the pending FTAs would require modifications to gain approval by Congress.[123] The BTD, which effectively amends TPA, in certain respects covers six areas: labor; environment; intellectual property; investment; government procurement and security, including port security. The most significant elements relate to labor and the environment. While the differences are far from revolutionary, they led directly to congressional approval of the Peru TPA once the BTD language had been used to modify the Peru PTPA as negotiated earlier. It remains uncertain whether the BTD will be effective in bringing about congressional approval of pending FTAs with Colombia, Panama and South Korea in 2009 or thereafter.[124]

A. Labor Issues

The BTD contemplates an "[e]nforceable reciprocal obligation for the countries [including, of course, the United States] to adopt and maintain in their laws and practice the five basic internationally-recognized labor principles, as stated in the ILO Declaration on Fundamental Principles and Rights at Work" as well as acceptable working conditions.[125] This contrasts with agreements such as the DR-CAFTA that lack the enforceable obligation but define "labor laws" with reference to a similarly worded list of "internationally recognized labor rights."[126]

In the PTPA the relationship between international labor rights and local law is now explicitly set out:

> 1. Each Party shall adopt and maintain in its statutes and regulations, and practices thereunder, the following rights, as stated in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)* (ILO Declaration):
>
> (a) freedom of association;
>
> (b) the effective recognition of the right to collective bargaining;
>
> (c) the elimination of all forms of compulsory or forced labor;

122. Gary G. Yerkey, *Veroneau 'Confident' Deal Can Be Struck With Congress On Labor Provisions of FTAs*, 24 INT'L TRADE REP. 373 (2007).

123. *Id.* (discussing the efforts by U.S. Trade Representative Susan Schwab to reach agreement with Democrats on standards in trade agreements "which would pave the way for the FTAs with Columbia, Peru, and Panama to move forward in Congress . . ."); BTD, *supra* note 24.

124. *See* GANTZ, *supra* note 1, ch. 9 (discussing the agreements with Peru, Panama, Colombia and Korea).

125. BTD, *supra* note 24, at 1.

126. DR-CAFTA, *supra* note 13, art. 16.8.

> (d) the effective abolition of child labor and, for purposes of this Agreement, a prohibition on the worst forms of child labor; and
>
> (e) the elimination of discrimination in respect of employment and occupation.
>
> 2. Neither Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes or regulations implementing paragraph 1 in a manner affecting trade or investment between the Parties, where the waiver or derogation would be inconsistent with a fundamental right set out in that paragraph.[127]

Nevertheless, "[t]o establish a violation of an obligation under Article 17.2.1 a Party must demonstrate that the other Party has failed to adopt or maintain a statute, regulation, or practice in a manner affecting trade or investment between the Parties."[128] Whether a Party maintains a statute or regulation "in a manner affecting trade or investment" is subject to some interpretation, which the panelists will presumably supply if and when a labor dispute is referred to dispute settlement under the binding arbitration provisions of Chapter 21 of the Peru FTA.[129]

For a Party to comply with these new provisions, it "shall" incorporate the ILO core principles into national law; a Party no longer satisfies the requirements by "striving" to incorporate. Thus, a violation of the ILO principles becomes *ipso facto* a violation of national labor laws, and another Party may seek enforcement of the obligation under the dispute settlement provisions of the Agreement.

Even with the BTD modifications, significant limitations persist. These limitations may serve to protect the United States and other parties from actions alleging a lack of labor rights enforcement. Notably, as with the "affecting trade and investment" condition, "non-enforcement of labor obligations [must have] occurred through a sustained or recurring course of action or inaction."[130] Thus, individual violations are not actionable.

Additional limitations include: (1) applicability of the provisions only to federal labor laws, (2) invocation of the dispute settlement provisions only by the government, and (3) panel decisions that are neither self-executing nor able to alter U.S. or other national law.[131] It remains to be demonstrated that the BTD language as incorporated into the FTAs will significantly affect the observance of labor rights under the FTAs. Still, at minimum, the language

127. Peru TPA, *supra* note 18, art. 17.2.
128. *Id.* art., 17.2 n.1.
129. *See id.* art. 17.2.
130. BTD, *supra* note 24, at 1.
131. *Id.* at 1–2.

provides a basis for Party action should a Party such as the United States be interested in such enforcement.

Under the BTD, both fines and trade sanctions would be available for violations, "based on amount of trade injury."[132] Thus, as reflected in the new PTPA language the differing treatment between violations of the trade provisions of earlier FTAs, i.e., trade sanctions, and labor or environmental violations, i.e., fines, is eliminated. Articles 21.15, Implementation of the Final Report, and 21.16, Non-Implementation-Suspension of Benefits, provide that the failure of a Party to comply with or to reach agreement on compensation may lead either to the suspension of trade benefits or to the imposition of a monetary fine in lieu of trade sanctions, whether or not the subject of the dispute is labor, the environment or something else.

The BTD further specifies that FTA Parties may include in their government contracts requirements that suppliers must comply with core labor laws, including any applicable occupational health and safety requirements, in the country where either the good is produced or the services are performed. For example, a Peruvian supplier of goods to a government agency in the United Sates may be required to comply with core labor laws in Peru, and awards may presumably be challenged on the basis of a failure to comply.[133]

B. Environmental Issues

Under the BTD, a specific list of multilateral environmental agreements ("MEAs") is to be incorporated into FTAs negotiated by the United States.[134] While such a list does not appear in recent FTAs, the list approach represents an expansion of NAFTA rather than a totally new innovation. In the BTD, the incorporated MEAs include not only those listed in NAFTA, those relating to endangered species, protection of the ozone layer, control of trans-boundary movement of hazardous waste, and certain bilateral agreements between Canada, the United States and Mexico.[135] In addition, the BTD also includes MEAs not listed in NAFTA, such as the Ramsar Convention on Wetlands, the International Whaling Convention and the Convention on Conservation of Antarctic Marine Living Resources.[136]

The BTD, as implemented in the Peru TPA, provides:

> In the event of any inconsistency between a Party's obligations under this Agreement and a covered [environmental] agreement, the Party shall seek to balance its obligations under both agreements, but this shall not preclude the Party from taking a particular measure to comply with its obligations under the

132. *Id.* at 2.
133. *Id.*
134. *Id.*
135. NAFTA, *supra* note 9, art. 104.
136. BTD, *supra* note 24, at 2.

> covered agreement, provided that the primary purpose of the measure is not to impose a disguised restriction on trade.[137]

Also, the failure of an FTA Party to adhere to a listed MEA is a violation of the FTA that is subject to dispute settlement.[138] In provisions derived from the BTD that are unique among U.S. FTAs, the Peru FTA incorporates detailed obligations on the part of Peru to control illegal logging.[139]

The obligations are tightened by substituting "shall" for "strive" in enforcing environmental laws. These and other environmental violations will be enforced in the same manner as other violations, subject not simply to monetary assessments but to fines and trade sanctions.[140] Also, as in the case of labor, government procurement contracts may include provisions that promote environmental protection.[141]

C. Investment

Given the extensive changes in the investment provisions of U.S. FTAs required under the TPA language, one might have concluded that beginning with the Singapore and Chile FTAs no additional changes would be necessary.[142] To date, there have been no investment disputes in post-NAFTA FTAs that have reached the stage of investor-state arbitration.[143] Nevertheless, some in Congress apparently remain concerned that foreign investors bringing actions against the United States, or U.S. states, will receive better legal treatment than U.S. national investors bringing similar claims. The latter do not have available international arbitration against the United States Government or its agencies, although they have full access to the U.S. court system.

The result calls for a relatively minor fix. While there is to be no change in the now-standard investment protection language, the preamble to the four new agreements has been changed to provide explicitly that foreign investors will not be accorded greater substantive rights than are afforded U.S. investors regarding investment protections within the United States.[144] For example, in the PTPA, under the preamble's language, the Parties:

137. Peru TPA, *supra* note 18, art.18.13.4. This language is similar to that in NAFTA, *supra* note 9, art. 104.

138. *Id.*

139. BTD, *supra* note 24, at 3; Peru TPA, *supra* note 18, art. 18.3.4, annex 18.3.4.

140. *Id.* at 2–3.

141. *Id.* at 4.

142. *See, e.g.*, GANTZ, *supra* note 1, ch. 7.

143. As of March 2008, the arbitrators were being chosen for a dispute between a U.S. firm, Railroad Development Corp., and the Government of Guatemala. Rossella Brevetti, *Arbitration Panel in First CAFTA-DR Investor-State Case Awaits Arbitrator*, 25 INT'L TRADE REP. 350 (2008).

144. BTD, *supra* note 24, at 4.

> AGREE that foreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic investors under domestic law where, as in the United States, protections of investor rights under domestic law equal or exceed those set forth in this Agreement . . . ;[145]

As redacted, the language is considerably less troublesome to those in the United States favoring strong protection for foreign investment than the formulation in the BTD, itself. It limits the applicability of domestic law to situations, explicitly including the United States, where protection of investor rights are allegedly equal to or greater than those set out in the Agreement, i.e., those provided by customary international law and the explicit rights under Section A of the investment chapter.[146] The championing of domestic law is considerably less sweeping than the traditional "Calvo Clause" enshrined in many Latin American constitutions. These clauses commonly provided that foreign investors were to be subject to the same legal rights as local citizens and were obligated to resolve disputes in local courts, although the unfortunate approach in the BTD of asserting primacy of domestic law is similar.[147]

One can reasonably argue that under U.S. law, foreign investors currently possess all the legal rights guaranteed by customary international law, including those explicitly afforded in Section A of FTA investment chapters, as do U.S. domestic investors under the U.S. Constitution. Although some may disagree, there are undoubtedly some litigants against the U.S. government that personally would feel otherwise. If there is no difference, this clause has no substantive impact. It may be more troubling if and when applied on a reciprocal basis, by FTA partner governments defending against U.S. investors, if the governments assert that *their* local law also meets or exceeds the requirements of the particular FTA's investment chapter. Presumably, in a blatant case of uncompensated expropriation, as has occurred recently in Venezuela for example,[148] a tribunal would have no difficulty in dismissing the argument that protections under local law were no less significant than those provided under the investment chapter of the Agreement. In closer cases, such as an alleged regulatory taking, the language might give the arbitrators more pause.

145. Peru TPA, *supra* note 18, pmbl.

146. *Id.* art. 10.

147. *See* Michael J. Bond, *The Americanization of Carlos Calvo*, 22-8 MEALEY'S INT'L ARB. REP. 19, 19 (2007) (comparing the Calvo Doctrine to current U.S. policy on foreign investment). The traditional Calvo Clause also barred resolution of investor-state disputes other than through domestic courts. *Id.*

148. *See* Steve Gelsi, *Exxon Mobil's Hard Line on Expropriation*, MARKETWATCH (Feb. 14, 2008), http://www.marketwatch.com/news/story/exxon-mobil-take-hard-line/story.aspx?guid=%7b50AED756-680F-4B1C-BE4B-61AAABF4271B%7d&dist=hplatest&print=true&dist=printop (discussing Exxon's strategy in negotiations with the government of Venezuela over the taking of Exxon's production licenses).

D. Intellectual Property

The language adopted in the intellectual property provisions of the BTD recognizes the need for both strong intellectual property protection for developed country FTA partners and for greater flexibility for those partners. Developing country members of the FTAs should not be forced to accept a level of intellectual property protection that goes well beyond WTO obligations under the Agreement on Trade-Related Intellectual Property Rights ("TRIPS").[149] The focus of the BTD language is on pharmaceutical testing and the provisions in other recent FTAs that protect test data.[150] Under the BTD, test data in FTA partners would not be protected for longer periods than exist in the United States. Exceptions to normal intellectual property obligations would be allowed to protect public health. Also, extension of patents where national patent offices have caused delays would be subject to flexibility, rather than mandated; and greater developing-country flexibility would be permitted in deciding how to deal with patent-infringing products.[151] These measures will permit generic drugs to enter the market more rapidly in comparison to the earlier data exclusivity provisions.[152]

Finally, the FTAs must explicitly indicate that their provisions do not affect FTA partner rights to take necessary public health measures consistent with those permitted in the WTO Doha Declaration and presumably subsequent WTO accords and any TRIP amendments relating to pharmaceuticals and public health.[153]

E. Security

The Bilateral Trade Deal requires newer FTAs to state explicitly that the "essential security" section, patterned after GATT Article XXI, can be invoked to override other FTA obligations, including, but not limited to, port services; and such action is not subject to the dispute settlement provisions, such as Chapter 21 of the PTPA. The relevant language from the PTPA provides that "[f]or greater certainty, if a Party invokes Article 22.2, the national security provision, in an arbitral proceeding initiated under Chapter Ten (Investment) or

149. *See generally* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1125, 1197 (1994).

150. *See, e.g.*, DR-CAFTA, *supra* note 13, arts. 15.9.5, 15.10.

151. BTD, *supra* note 24, at 3.

152. *See* Rossella Brevetti, *Democratic, GOP Lawmakers Reach Agreement with Administration on FTAs*, 24 INT'L TRADE REP. 674 (2007) (discussing the major features of the BTD, including those relating to pharmaceuticals).

153. *See* World Trade Organization, TRIPS and Public Health, http://www.wto.org/english/tratop_e/trips_e/pharmpatent_e.htm (last visited Sept. 11, 2008) (listing, *inter alia*, the 2001 Doha Declaration on Public Health and the 2005 Decision on the Amendment of the TRIPS Agreement).

Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter *shall find* that the exception applies."[154] In other words, the tribunal has no discretion to second-guess the party invoking the national security exception. This new language may reflect, in part, the absence of similar language in the GATT/WTO system, which has led to at least one difficult dilemma when the invocation of GATT Article XXI was challenged in the Dispute Settlement Body.[155]

V. TPAS WITH PERU, PANAMA, COLOMBIA AND SOUTH KOREA

As discussed in Part IV, the result of the BTD was the incorporation of provisions reflecting the BTD into the agreements with Peru, Panama, Colombia and South Korea. They have become the test cases that will ultimately determine whether the BTD will encourage the United States Congress to ratify them and to permit a future president to negotiate similar accords in the future when and if he has obtained new TPA.

A discussion of the substantive provisions of these FTAs is beyond the scope of this article.[156] Textual similarities are shared by all four and by other recent U.S. FTAs, such as DR-CAFTA, despite some differences reflecting Panama's status as a service economy and Korea's as a highly developed and integrated trade powerhouse.

A. The Agreements

1. Peru, Panama and Colombia

The U.S. FTAs with Peru, Panama and Colombia apply to small Latin American nations with relatively limited capacity to export or to demand major changes in the standard U.S. FTA model. For the U.S. economy as a whole, the trade benefits or costs are insignificant. In contrast, for these Latin American economies, the expected economic development benefits are substantial. Peruvian officials have estimated that the implementation of the FTA with Peru will add at least one percentage point to GDP growth, on top of a strong 8.2% GDP growth rate through September 2006.[157] Colombia has similar expectations in terms of the economic benefits. Political considerations for all partners have played a part—especially with Colombia, which is closely

154. Peru TPA, *supra* note 18, art. 22.2 n.2 (emphasis added).

155. *See* Request for Consultations by the European Communities, *United States–The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/1 (May 3, 1996), *available at* http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds38_e.htm.

156. *See* GANTZ, *supra* note 1, ch. 9.

157. Lucien O. Chauvin, *Peru Welcomes Senate Passage of Free Trade Pact with United States*, 24 INT'L TRADE REP. 1776 (2007).

allied with the United States militarily due to the billions of dollars the United States has contributed to drug eradication there.[158]

The focus of the Panama FTA is on services more than trade in goods, although the latter play an important role in the bilateral relationship. Panama's economy is eighty percent service-based, with much of this relating to the Panama Canal[159] and international banking. The United States is in the unusual position of maintaining a trade in goods surplus with Panama, $2.3 billion on $3 billion worth of exports in 2006.[160] Some ninety-six percent of Panama's exports to the United States enter duty-free under Caribbean Basin Initiative preferences, yet most U.S. goods are subject to Panama's seven percent MFN tariff.[161] Most U.S. agricultural products will enter Panama duty-free at the outset of the Agreement, although there will be phase-in periods of up to fifteen years for some products.

For the United States, a principal objective of the Panama FTA is to improve U.S. market access for services, through expanded rights of establishment and better regulatory transparency, along with elimination of restrictions on investment in retail trade, better access to contracting related to the Panama Canal and improved access to professional services.[162] Access for U.S. firms to bidding on the $5 billion plus canal expansion project[163] was evidently a key factor in the U.S. decision to conclude the FTA.

158. Letter from Jess T. Ford, United States General Accounting Office, Drug Control: Coca Cultivation and Eradication Estimates in Columbia, (Jan. 8, 2003), *available at* http://www.ciponline.org/colombia/d03319r.pdf. *See* Gary G. Yerkey, *Colombia to Make All-Out Bid in U.S. Visits To Win Congressional Endorsement of FTA*, 24 INT'L TRADE REP. 1302 (2007) (quoting Colombian President Uribe's statements that congressional failure to approve the FTA would mean that the United States was turning its back on a close ally in the region).

159. Press Release, U.S. Trade Rep., U.S. and Panama Complete Trade Promotion Agreement Negotiations (Dec. 19, 2006), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2006/December/US_Panama_Complete_Trade_Promotion_Agreement_Negotiations_printer.html [hereinafter USTR Statement].

160. ADVISORY COMM. FOR TRADE POLICY & NEGOTIATIONS, U.S. TRADE REP., REPORT TO THE PRESIDENT, THE CONGRESS, AND THE UNITED STATES TRADE REPRESENTATIVE ON THE U.S.-PANAMA FREE TRADE AGREEMENT 2 (2007), *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Panama_FTA/Reports/Section_Index.html.

161. *Id.* at 3.

162. *Id.* at 3–4. *See generally* Panama TPA, *supra* note 20, ch. 11.

163. *See Panama Plans Huge Canal Expansion; Panama Has Announced an Ambitious $5.3bn (£2.9bn) Plan to Widen its Famous Canal to Handle a New Generation of Giant Container Ships*, BBC NEWS, Apr. 25, 2006, http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/americas/4941126.stm (indicating the Panamanian view that expansion is necessary to maintain the Canal's status as a major route for global cargo).

2. U.S.-Korean FTA (KORUS)

The economic relationship between the United States and Korea is far more substantial than with Peru, Panama and Colombia, reflecting the fact that Korea is the world's tenth-largest economy.[164] U.S.-Korean trade is roughly $80 billion per year, twice that with the DR-CAFTA group as a whole and more than any other FTA except NAFTA. The security alliance, with thousands of U.S. troops still stationed in Korea, reflects "a half century of friendship and cooperation."[165] The USITC, reporting on the likely effects of KORUS, noted that for most products traded between Korea and the United States, the U.S. imports are subject to lower tariffs and fewer quotas than vice versa.[166] The USITC concluded that U.S. GDP would increase by about $10 billion to $12 billion as a result of the Agreement, two-way trade would increase by about $16 billion to $18 billion, and that U.S. services exports would increase because of Korea's market access, national treatment and transparency obligations going beyond Korea's GATS obligations. The overall impact on U.S. output and employment, however, would be negligible.[167]

Despite the relatively rosy picture painted by the USITC, trade with Korea is highly sensitive in several areas. These areas include Korean restrictions on U.S. agricultural products, beef and rice in particular. Since the United States did not demand during negotiations that Korea open its rice market, beef is a centerpiece of the FTA to the extent that it covers agriculture. The U.S. beef industry sees rising meat consumption in Korea as an opportunity to increase its beef exports significantly. Unfortunately, until mid-2008, Korea continued to block all U.S. beef shipments despite the fact that concerns over Mad-Cow Disease in 2004 had been resolved in most other jurisdictions. The U.S. beef industry and its many supporters in Congress and the Bush administration are likely to continue to oppose KORUS "until commercially viable beef trade is occurring based on the internationally recognized guidelines established by the World Organization for Animal Health (OIE)."[168]

164. Press Release, U.S. Trade Rep., United States and the Republic of Korea Sign Landmark Free Trade Agreement, June 30, 2007, *available at* http://www.ustr.gov/Document_Library/Press_Releases/2007/June/United_States_the_Republic_of_Korea_Sign_Lmark_Free_Trade_Agreement_printer.html.

165. *Id.*

166. U.S. INT'L TRADE COMM'N, U.S.-KOREA FREE TRADE AGREEMENT: POTENTIAL ECONOMY-WIDE AND SELECTED SECTORAL EFFECTS, at xvii (2007), *available at* http://hotdocs.usitc.gov/docs/pubs/2104f/pub3949.pdf.

167. *Id.*

168. ANIMAL & ANIMAL PRODS. AGRIC. TECHNICAL ADVISORY COMM., U.S. TRADE REP., ANIMAL AND ANIMAL PRODUCTS ADVISORY COMMITTEE REPORT TO THE PRESIDENT, THE CONGRESS AND THE UNITED STATES TRADE REPRESENTATIVE ON US-KOREAN FREE TRADE

Commitments by Korean President Lee Myung-bak to President Bush to reopen the Korean market to U.S. beef were met with such widespread political opposition in Korea that President Lee was effectively forced to withdraw the assurances.[169] In June 2008, Korea and the United States confirmed a protocol in which Korea agreed to lift restrictions on beef imports from cattle less than thirty months old, a dividing line believed to further reduce the risk of Mad-Cow Disease.[170] It remains unclear at this writing whether President Lee will be able to implement fully the supplementary agreement domestically or whether the limitations it incorporates will be acceptable to the Congress and Senate.[171] As of early 2009, the signs are positive.

Provisions of KORUS that will eliminate the current 2.5% MFN tariff on autos with engines of 3.0 liters or less are also opposed by the U.S. auto industry and its congressional supporters for obvious reasons given the precarious economic status of the "Big Three." Opponents fear that without the tariff, Korea will expand the current 700,000 annual automobile exports, worth some $10 billion. Substantial increases are anticipated in small truck exports as the current twenty-five percent MFN tariff is phased out over ten years. The U.S. auto producers manage to export to Korea no more than a few thousand autos worth $503 million per year at an average eight percent MFN tariff.[172] Regardless of how one may criticize the products or marketing of the U.S. "Big Three" in Korea, logic suggests that the disparity must be due at least in part to non-tariff barriers.[173]

AGREEMENT 1 (2007), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Reports/asset_upload_file944_12768.pdf.

169. Blaine Harden, *In S. Korea, Regrets and Assurances on U.S. Beef*, WASH. POST, May 23, 2008, at A10.

170. Press Release, U.S. Trade Rep., USTR Confirms Korea's Announcement on U.S. Beef, June 21, 2008, *available at* http://www.ustr.gov/assets/Document_Library/Press_Releases/2008/June/asset_upload_file711_14948.pdf.

171. *See generally* Amy Tsui, *USTR Welcomes Korean Publication of Rules For Importing U.S. Beef Under Protocol*, 25 INT'L TRADE REP. 989 (2008) (reporting unhappiness with the accord on the part of Senate Finance Committee Chair Max Baucus).

172. OFFICE OF TRADE POLICY ANALYSIS, INT'L TRADE ADMIN., U.S.-KOREA FREE TRADE AGREEMENT MARKET ACCESS RESULTS: AUTOS AND AUTO PARTS 1 (2007), *available at* http://www.ita.doc.gov/td/tradepolicy/sectorreports/korea_automotives.pdf; INDUS. TRADE ADVISORY COMM. ON AUTOMOTIVE EQUIP. & CAPITAL GOODS, U.S. TRADE REP., ITAC 2 ADVISORY COMMITTEE REPORT TO THE PRESIDENT, THE CONGRESS, AND THE UNITED STATES TRADE REPRESENTATIVE ON THE US-KOREA FREE TRADE AGREEMENT 2 (2007), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Reports/asset_upload_file532_12770.pdf.

173. *See Lawmakers, Labor Leaders Denounce U.S.-South Korea Free Trade Agreement*, 24 INT'L TRADE REP. 883 (2007) (reporting on the "unfairness" of Korean restrictions on U.S. autos and beef, and stringent restrictions on imports of rice); U.S. TRADE REP., FREE TRADE WITH KOREA, SUMMARY OF THE KORUS FTA 1–2 (2007), *available at* http://www.ustr.gov/assets/

A third key aspect of the agreement, politically sensitive for both the United States and Korea, and considered a national security issue for the United States, is the status of the North Korean Kaesong Industrial Complex located near the North Korea-South Korea border. The treatment of Kaesong under KORUS is vague; it simply creates a committee to study the issue.[174] Congressional leaders have demanded, with some justification, that products with a high level of North Korean content, manufactured or assembled on North Korean soil, be precluded from the benefits of the FTA unless both the United States and Korean Government are in full agreement on timing and conditions.

B. Congressional Action?

The risks of predicting when and if these pending agreements, except for the PTPA, might be approved by Congress are substantial given the factors discussed earlier. Consequently, this section is largely restricted to pointing out any additional considerations that have permitted or discouraged approval to date.

1. Peru TPA

Peru proved to be the easy case of the four and certainly the only "slam dunk" among FTAs with any Latin American nation. It was brought to a vote in Congress first.[175] The FTA passed the Democratically-controlled House of Representatives by a vote of 285-132, or more than two-thirds, with 109 House Democrats voting affirmatively, although more than half of the congressional Democrats still voted "no."[176] In contrast, several years earlier, DR-CAFTA passed the Republican-controlled House by only two votes.[177] A few weeks later, the vote in the Senate on the PTPA was 77-18.[178]

A number of factors converged to bring about this result. First, the Peruvian Government made extensive efforts to convince members of

Document_Library/Fact_Sheets/2007/asset_upload_file811_11034.pdf (discussing improved auto and agricultural market access for U.S. goods).

174. KORUS, *supra* note 21, annex 22-B.

175. Gary G. Yerkey, *Congress Set to Move on Peru FTA as Peruvian President Touts Benefits*, 24 INT'L TRADE REP. 1302 (2007) (quoting Rep. Joseph Crowley (D-N.Y.)).

176. Rossella Brevetti, *House Approves Peru FTA Bill; 116 Democrats Vote Against Measure*, 24 INT'L TRADE REP. 1620 (2007) (showing that a larger number of Democrats voted against the FTA).

177. OFFICE OF THE CLERK, U.S. H.R., FINAL VOTE RESULTS FOR ROLL CALL 443 (2005), *available at* http://clerk.house.gov/evs/2005/roll443.xml (showing that the vote was 217-215, with only 15 Democrats in support).

178. Rossella Brevetti, *Senate Passes U.S.-Peru FTA Bill, Clearing Measure for Bush's Signature*, 24 INT'L TRADE REP. 1735 (2007).

Congress during numerous visits to Peru[179] that Peru was serious about enacting labor and environmental legislation consistent with its revised obligations under the PTPA. Secondly, some Democrats wished to show that they were not entirely anti-trade and perhaps wanted to avoid the embarrassing two-vote margin in the House when the DR-CAFTA was approved.[180] The most significant factor was undoubtedly the BTD. This, the first concrete result of the BTD, plus Peruvian cooperation in changing not only the PTPA but in making specific commitments regarding new legislation made it possible for the House leadership to endorse the PTPA as a "New Deal for International Trade and Workers":

> On May 10, House Democrats accomplished an historic breakthrough on trade by amending pending U.S. free trade agreements (FTAs) with Peru and Panama to incorporate a fully enforceable commitment that countries adopt and enforce the five basic international labor standards, subject to the same dispute settlement mechanism and remedies as other FTA obligations.
>
> Since then, we have undertaken discussions with Peru regarding implementation of these obligations . . . .
>
> [W]e have continued to work with representatives of the Peruvian Government on implementation of the announced changes, and concluded discussions last week . . . . With the changes and the FTA, the United States now has a framework to bring about Peru's compliance with basic international labor standards.
>
> House Democrats came together to oppose the U.S.-Central America FTA (CAFTA) precisely because that agreement did not incorporate basic workers' rights as a key instrument to spread the benefits of expanded trade. This is not the case with the Peru FTA, which includes the international workers rights standard for which we have been fighting. Knowing trade is an issue about which there are differing perspectives, we urge you to carefully consider what has been accomplished with this agreement, and the importance of broad support within our ranks.[181]

One may speculate as to how much easier it might have been for the Bush administration to enact TPA and obtain the approval of FTAs earlier had there been some effort from 2002–2006 by the Republican House leadership to reach out to the generally pro-trade Democrats in both houses of Congress. Such efforts might have achieved a compromise much sooner on labor and

179. Lucien O. Chauvin, *Peru's Government Proposes Labor Measures to Seal Congressional Passage in U.S. of FTA*, 24 INT'L TRADE REP. 1181 (2007).

180. Yerkey, *supra* note 175 (quoting Rep. Greg Meeks (D-N.Y.)).

181. Letter from Rep. Charles B. Rangel, Chairman, U.S. H.R. Comm. on Ways & Means & Rep. Sander M. Levin, Chairman, Subcomm. on Trade, U.S. H.R. Comm. on Ways & Means, to the Democratic Members of the H.R. (Sept. 18, 2007).

environmental issues that likely would have brought several dozen more Democratic votes in favor of such FTAs as DR-CAFTA without undermining the trade benefits in any real sense.

Even with the BTD, there were critics in both the United States and Peru. Public Citizen's Global Trade Watch accused the Democratic congressional leadership for failing to assure that the Peruvian labor legislation was enacted before Congress approved the PTPA.[182] A Peruvian labor leader made essentially the same criticism, alleging that once the FTA had been enacted, Peru would renege on its labor law commitments.[183]

More than a year passed before the Agreement entered into force on February 1, 2009, despite last-minute objections.[184] Peruvian officials indicated that more than seventy laws and other norms had to be changed in order for Peru to comply with its obligations under the PTPA,[185] and it is evident in retrospect that the United States required that essentially all such changes be made before the United States was willing to permit the Agreement to take effect.

The success of negotiations with the United States has contributed to Peruvian confidence in undertaking additional FTA negotiations. Those with China are modeled along the lines of an earlier Chinese FTA with Chile. A Peruvian government official noted, with admirable understatement, that "China is not like the United States. It does not have a Congress like that in the United States."[186]

2. Panama and Colombia TPAs

Ironically, the factors that have discouraged prompt congressional action on the Panama TPA and Colombia TPA have little to do with the contents of the agreements themselves and only peripherally with the BTD. The rationale for delay in both situations has been political, although hardly irrational.

With Panama, the problem was that the president of the Panamanian National Assembly until September 2008, Pedro Miguel González Pinzón, is under indictment in the United States for the murder of an American serviceman in 1992. Until González's term expired in September 2008, it was highly unlikely that the President would send the Panama TPA to Congress for

182. Rossella Brevetti, *Labor Leader Charges that Peru Will Not Implement FTA Promises*, 24 INT'L TRADE REP. 1326 (2007) (quoting Lori Wallach, Director, Public Citizen's Global Trade Watch).

183. *Id.* (quoting Julio Cesar Bazán, President, Confederación Unitaria de Trabajadores).

184. *Schwab Certifies Peru FTA Despite Labor Complaints from Key Democrats*, 27 INSIDE U.S. TRADE (Jan. 23, 2009).

185. Chauvin, *supra* note 157.

186. Lucien O. Chauvin, *Peru Set to Begin Free Trade Talks With China, Marking Improving Relations*, 25 INT'L TRADE REP. 83 (2008).

approval.[187] When González stepped down, no reason remained to delay congressional action, except perhaps the general reluctance of the Congress to consider a trade agreement only a few months before a national election and the Bush administration's insistence that Colombia be considered despite lack of congressional support.[188] There was also an argument for prompt action regarding Panama on the U.S. side; a long delay would likely make it more difficult for American firms to bid successfully on various pieces of the Canal expansion project.

The issue with Colombia was much more complex. House Speaker Nancy Pelosi asserted the existence of "widespread 'bipartisan concern'" among members of Congress relating to periodic violence against labor leaders in Colombia. There also has been a belief in Congress and elsewhere that the violence was perpetrated at least in part because of relationships between officials in the Colombian Government and paramilitary forces that are responsible for the violence.[189] Here, unlike the situation with Panama, there is no obvious solution. Those opposed to the agreement in Congress have set no clear goals as to what Colombian government officials must do in order to satisfy U.S. congressional opponents.[190] Even speaking with Colombian authorities about the TPA is suspect; a top Clinton aide was fired for meeting with the Colombian ambassador in early April.[191]

The fact that the opposition is led by U.S. labor unions and their supporters in Congress, a group that is typically opposed to trade agreements with anyone under any circumstances, makes it difficult to assess the legitimacy of the opposition. There is little doubt, however, that U.S. union concerns over serious violence against members of labor unions, among other groups, in Colombia are well-founded. The action of Colombian authorities in May 2008 to turn over a large group of suspected terrorists and drug traffickers for trial in the United States did not satisfy congressional opponents even though terrorists are thought to be responsible for some of the violence against union officials.[192]

187. *See generally* Rossella Brevetti, *Colombia, Panama Free Trade Agreements Face Challenges in 2008*, 25 INT'L TRADE REP. 96 (2008) (discussing the obstacles to U.S. approval of the Panama and Colombia TPAs).

188. *See* Steve Charnovitz, *The Bush-Schwab Policy on the Colombia FTA Has Failed Miserably*, ICTSD, Vol. 12, no. 6, Dec. 2008, *available at* http://ictsd.net/i/news/bridges/38010.

189. Gary G. Yerkey, *Democratic Leaders Reject Bush Call for Early Vote on Colombia Free Trade Pact*, 25 INT'L TRADE REP. 165 (2008).

190. *Id.* (referring to complaints by U.S. Trade Representative Susan Schwab).

191. Anne E. Kornblut & Dan Balz, *Clinton's Chief Strategist Steps Down*, WASH. POST, Apr. 7, 2008, at A1 (noting that Mark J. Penn was fired after a meeting with the Colombian Ambassador organized by Penn's lobbying firm).

192. Juan Forero, *Colombia Sends 13 Paramilitary Leaders to U.S.; Extradition Likely to Benefit Alleged Allies in Legislature*, WASH. POST, May 14, 2008, at A11.

3. KORUS

As of January 2009, it seemed unlikely that the Obama administration would seek, nor the Congress grant, approval of KORUS in the foreseeable future. The crisis facing the U.S. auto industry discourages early action on an Agreement that might encourage additional imports of foreign autos in competition with U.S. producers. Eventually, the Kaesong Industrial Zone concerns must also be resolved. Thus, Congress has at least three excuses for not acting. Given the magnitude of the trade between the two nations and the potential for expansion, along with the continuing national security relationship, it is not unreasonable to assume that KORUS will eventually be approved, but probably not during 2009 and not without some further negotiations or side letters to address outstanding issues.

VI. CONCLUSION

The discussion over whether the negotiating objectives of the 2002 TPA, as modified by the BTD, have been or can be achieved continues. While the success of the BTD to date is not encouraging, the BTD is likely to serve as a starting point when and if the TPA renewal discussions commence, especially given President Obama's commitment to strong labor and environmental enforcement during the campaign and continuing union support in the White House and Congress. However, given the substantial opposition of at least half the Democrats in Congress to trade agreements, one cannot assume that President Obama will have an easy time of negotiating new TPA with Congress. Still, in the author's view, a failure to promptly seek, negotiate and implement TPA will destroy the United States' ability to participate meaningfully in trade negotiations, either in Geneva or regionally, a situation that no responsible president (nor congressional leadership) should welcome.

As suggested earlier, the impact of this U.S. trade debate goes well beyond rhetoric and well beyond U.S. shores. U.S. international economic policy and leadership on global economic issues, and the credibility it does or does not generate, significantly affect broader U.S. interests in the world, including maintenance of world peace and security, strengthening of democratic institutions and support of economic development and the rule of law. FTAs with developing countries in particular provide a means of helping those countries with virtually no harm to U.S. interests. Agreements with more substantial economies that are potential destinations for a higher volume of exports, such as Korea, promise new U.S. domestic investment and job creation. Thus, renunciation of the trade agreement tool would be extremely unfortunate for all concerned and would likely lead to a further undermining of U.S. influence in the world in international economic matters and otherwise.